



November 16, 1999

Ms. JoAnn S. Wright
Walsh, Anderson, Brown, Schulze, and Aldredge
P.O. Box 2156
Austin, Texas 78768

OR99-3281

Dear Ms. Wright:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID#128833.

The Dimmit Independent School District (the "school district") received a request for "all funds spent by [the school district] in regards to the currently ongoing due process hearing involving the education of" the requestor's son. In response to the request, you submit to this office for our review the information which you assert is responsive. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the arguments and exceptions you raise and reviewed the submitted information.

At the outset we address your representation that "[n]o document exists that constitutes 'an accounting' and the Dimmit ISD is not required to create a document."¹ A governmental body is not expected to produce information which does not exist, nor does the act require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 555 (1990), 362 (1983). We agree that the school district is not required to provide information which is not in its possession. Open Records Decision No. 452 (1986). However, to the extent you have submitted some responsive records, we will next address the applicable exceptions.

You contend that the submitted information at issue relates to the school district's defense of litigation and is, therefore, excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.);

¹A governmental body must make a good faith effort to relate a request to information which it holds. Gov't Code § 552.222(b); see Open Records Decision Nos. 563 (1990), 561 (1990).

Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend that the "[s]pecial education due process hearings are heard by a state appointed hearing officer and are quasi-judicial in nature" and "[t]he information requested has direct bearing on the litigation." You have not, however, established that the "litigation" to which you refer is the type of proceeding considered to be litigation under the Public Information Act. *See, e.g.*, Open Records Decision No. 588 (1991) (contested case under Administrative Procedure Act is litigation for purposes of section 552.103). You also have not sufficiently explained the circumstances which lead you to believe that the school district reasonably anticipates litigation involving the requestor. For these reasons, we conclude that the information at issue is not excepted from disclosure under section 552.103 of the Government Code.

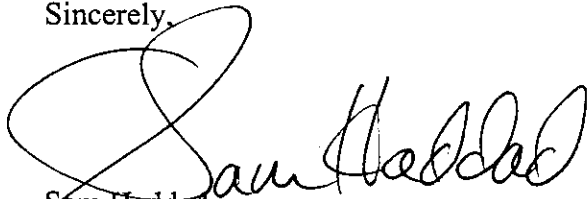
You have also asserted that the information at issue is protected by section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. ORD 574 at 5. Section 552.107(1) does not except purely factual information from disclosure, nor does it protect information gathered by an attorney as a fact-finder. Open Records Decision Nos. 574 (1990), 559 (1990), 462 (1987). Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memoranda sent. ORD 574 at 5. Based on the records at issue, we conclude that the information you have redacted does not contain any information subject to protection under section 552.107 of the Government Code.³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Haddad", with a large, stylized initial "S" that loops around the first part of the name.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 128833

Encl. Submitted documents

cc: Mr. Kyle Collins
607 Maple Street
Dimmit, Texas 79027
(w/o enclosures)

³In the future, we advise your office to submit unredacted copies of the information, such that we can adequately review the records. In this instance, we were able to read through the redactions to determine whether the information was subject to the claimed exceptions.